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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: SEP 26 2013

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a merchant services provider. It seeks to employ the beneficiary permanently in the United States as a senior account manager. As required by statute, the petition is accompanied by labor certification application approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the petition requires at least the equivalent of a Master's degree, and, therefore, that the beneficiary cannot be found qualified for classification as a member of the professions holding an advanced degree. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's April 26, 2013 denial, the issue in this case is whether or not the petitioner has established that the petition requires at least the equivalent of a master's degree such that the beneficiary may be found qualified for classification as a member of the professions holding an advanced degree.

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1).

The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." An "advanced degree" is defined as:

[A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of the Act are "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

- (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or

- (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In addition, the job offer portion of the labor certification must require a professional holding an advanced degree. *See* 8 C.F.R. § 204.5(k)(4)(i).

Therefore, an advanced degree professional petition must establish that the beneficiary is a member of the professions holding an advanced degree, and that the offered position requires, at a minimum, a professional holding an advanced degree. Further, an "advanced degree" is a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, *or* a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty.

Here, the Form I-140 was filed on August 13, 2012. On Part 2 of the Form I-140, the petitioner selected item "d" which indicated that it was filing the petition for a member of the professions holding an advanced degree.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹ On appeal, counsel submits a brief with supporting documentation and asserts that the ETA Form 9089 requires the beneficiary to have the equivalent of a Master's degree in International Relations, Business Administration or a related field for entry into the proffered profession.²

In this case, the labor certification indicates in Section H.8-B that an alternate "combination of education and experience in lieu of a Master's degree" is acceptable for the position. Additionally,

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents.

² Counsel states on appeal that the director erred in denying the petition without first issuing a Request for Evidence (RFE). The regulation at 8 C.F.R. § 103.2(b)(8) clearly states that a petition shall be denied "[i]f there is evidence of ineligibility in the record." The regulation does not state that the evidence of ineligibility must be irrefutable. Where evidence of record indicates that a basic element of eligibility has not been met, it is appropriate for the director to deny the petition without a request for evidence. If the petitioner has rebuttal evidence, the administrative process provides for a motion to reopen, motion to reconsider, or an appeal as a forum for that new evidence. In the present case, the evidence indicated that the petitioner had not established that the petition requires at least the equivalent of a Master's degree, and, therefore, that the beneficiary cannot be found qualified for classification as a member of the professions holding an advanced degree. Accordingly, the denial was appropriate, even though the petitioner might have had evidence or argument to rebut the finding.

the labor certification states in Section H.8-C that four years of experience is acceptable in combination with the other "education and experience in lieu of a Master's degree" for the offered position. As noted above, a United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. 8 C.F.R. § 204.5(k)(2). However, the classification sought must be for a position that requires at least a degree above a baccalaureate, or a baccalaureate degree and five years of professional experience. *Id.* The alternative education specified by the labor certification, which is an unspecified amount of education and experience in lieu of a Master's degree, indicates the position requires less than a full Master's degree, or a Bachelor's degree and five years of progressive experience in the specialty. The labor certification, therefore, does not support the Form I-140 petition which was filed for a member of the professions holding an advanced degree. There is no provision in statute or regulation that compels United States Citizenship and Immigration Services (USCIS) to readjudicate a petition under a different visa classification once the decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988). The petition must, therefore, be denied.

Beyond the decision of the director, the petitioner has not established that it has maintained the continuing ability to pay the proffered wage of the beneficiary from the April 2, 2012 priority onward.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).

In this instance, the only evidence submitted in support of the petitioner's ability to pay the proffered wage from the priority date onward are unaudited financial statements submitted by the petitioner. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of

management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The petitioner did submit copies of its 2010 and 2011 tax returns which would show the ability to pay the proffered wage based upon the petitioner's net income and net current assets in those years. Those years, however, predate the priority date and may be considered only generally in an ability to pay analysis based on the totality of circumstances. It is noted that the Form I-140 petition was filed on or about August 16, 2012. According to the tax returns submitted by the petitioner, its tax year is based on a calendar year. Its 2012 tax return would not have been due when the petition was filed. In any future filings, the petitioner must submit evidence of its ability to pay the proffered wage from the priority date onward.

In summary, the offered position does not require an advanced degree. Therefore, the petition cannot be approved for a member of the professions holding an advanced degree under Section 203(b)(2) of the Act. The director's decision is affirmed. Beyond the decision of the director, the record of proceeding does not establish the petitioner's ability to pay the beneficiary's proffered wage from the priority date onward.

Accordingly, the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.